

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 05-0474
Sales/Use Tax
For the Period: 2001-2004

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ISSUE

I. Sales/Use Tax – Miscellaneous Items

Authority: IC § 6-8.1-5-1(b); 45 IAC 15-5-3(b); *Hoogenboom-Nofziger v. State Bd. Of Tax Comm'rs*, 715 N.E.2d 1018 (Ind. Tax Ct. 1999); 45 IAC 2.2-4-27; 45 IAC 2.2-5-14; 45 IAC 2.2-1-1(d); IC § 6-2.5-3-2(a)

Taxpayer protests the proposed assessment of tax on miscellaneous items.

II. Tax Administration – Interest and Penalty

Authority: IC § 6-8.1-3-17(c); 28 Indiana Register 3585; IC § 6-8.1-10-1; 45 IAC 15-11-2

Taxpayer protests the proposed assessment of interest and penalty.

STATEMENT OF FACTS

The taxpayer rents, sells, and repairs fork lifts used by businesses and governmental entities. In addition, the taxpayer manufactures and installs bridge cranes, and it sells packaging and handling supplies via catalog sales. The taxpayer was audited, and as a result of the audit the taxpayer protested the proposed assessments. The exact nature of the taxpayer's protest was unclear, and thus the Department asked the taxpayer to specify the issues within its protest and to provide relevant information prior to the hearing. The taxpayer did not clarify, nor did it provide the information. Once the file was assigned to a Hearing Officer, the Department scheduled an administrative hearing. The taxpayer requested extensions of time for the hearing. The hearing was eventually conducted as a telephone conference call on October 13, 2006. More facts will be provided below.

I. Sales/Use Tax – Miscellaneous Items

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC § 6-8.1-5-1(b) states in pertinent part:

The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.

The Indiana Administrative Code also states “[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer....” 45 IAC 15-5-3(b)(8).

It is also important to note 45 IAC 15-5-3(b)(7), which states the “purpose of the hearing is to *clearly* establish the taxpayer's *specific* objections to the assessment and *reasoning* for these objections.” (*Emphasis added*).

Also relevant, although a property tax case, is *Hoogenboom-Nofziger v. State Bd. Of Tax Comm'rs*, 715 N.E.2d 1018, 1024 (Ind. Tax Ct. 1999), a case in which the Indiana Tax Court explained that, “State Board hearing officers do not have the duty to make a taxpayer's case.”

As noted, after the Department received the taxpayer's original protest letter, the Department asked the taxpayer to clarify its protest. During the telephone hearing it remained evident that the Department would need the taxpayer to provide a clear, written account of exactly what it was protesting and to provide any relevant supporting documentation. Thus the Department gave the taxpayer an additional week to submit a brief and documentation. (Note: On the day the information was due, the Department received the following faxes: one set of faxed documents that had a cover sheet stating it contained 40 pages of faxed documents; another set of faxes with a cover page stating it was 28 pages; the taxpayer also sent a fax with a cover sheet that states it was “86” pages, but it was in fact only five faxed pages. The taxpayer mailed copies of the faxes, grouped as 40 pages and 28 pages—no copy of the purported “86” page fax was received).

Exemption Certificates:

The Audit Report notes, “The Taxpayer was not in compliance with the sales tax statutes. They failed to maintain exemption certificates.” The Audit Report further states that the taxpayer had “in excess of 2,000 customers” that had “no exemption certificates and Indiana activity.”

The taxpayer states in its brief:

[Taxpayer] has obtained Indiana Sales Tax Exemption Certificates, ST-105, and/or direct pay permits from some of [*sic*] customers listed on the Indiana Department of Revenue Audit Summary. See attached [taxpayer] prepared summary of sales and copies of exemption documents collected. Please remove those sales where exemption documents have been provided.

The taxpayer faxed to the Department numerous documents. The Department notes that it is incumbent upon the taxpayer to provide the documents in a presentable manner (*See* 45 IAC 15-

5-3(b)(7)). Nonetheless, the Department asks that the Audit Division examine the various documents relating to this issue.

Consumable Supplies:

The Audit Report states:

The Taxpayer failed to pay use tax on consumable supplies like oil and grease used on maintaining its rental fleet. Per 45 IAC 2.2-4-27, a person engaged in the business of renting or leasing tangible personal property is considered the consumer of supplies, fuels, and other consumables which are furnished with the property being rented or leased.

45 IAC 2.2-4-27(d)(4) states:

Supplies furnished with leased property. A person engaged in the business of renting or leasing tangible personal property is considered the consumer of supplies, fuels, and other consumables which are furnished with the property which is rented or leased.

Regarding this issue, the taxpayer states:

IDR audit report does not include the referenced study. [Taxpayer] has prepared a calculation of consumables based upon our records. Documentation for the \$600 estimate for loaner parts is also attached.

The “study” mentioned by the taxpayer was its own internal study. The taxpayer also indicated at hearing that the consumables are sold as part of the rental arrangement. The taxpayer bears the burden of proof and has not met it on this issue. The taxpayer’s protest is denied.

Supplies—General:

The taxpayer’s brief on this issue simply says: “IDR audit report does not include the referenced study.” At the hearing, the taxpayer asserted that it disagreed with the audit regarding cleaners and small tools (particularly with regards to the loaner equipment and the rental fleet). The study is an internal study prepared by the taxpayer. Again the Department references to 45 IAC 15-5-3(b)(7) and 45 IAC 15-5-3(b)(8). The taxpayer’s protest is denied.

Paid Sales Tax:

Taxpayer next states that the “IDR summary of 2003 transactions includes charges from [Company X Paging] and [Company Y Graphics] that are already subject to tax or should be exempt.” Taxpayer further says, “Copies of the [Company X Paging] invoices showing sales tax paid are included with this protest.” The Department was not able to find the [Company X Paging] invoices amongst the numerous faxed documents. The Department notes that that taxpayer did not provide a reference system within the brief and documentation to assist the Department in sorting through the various documents (for example, exhibit numbers, tabs, etc.). Thus the taxpayer’s protest is denied.

Next, the taxpayer asserts that [Company Y Graphics] involve “stickers that go directly on the forklifts that [taxpayer] sells or rents. These graphics are sold with the forklifts and are exempt as resale per 45 IAC 2.2-5-14.”

45 IAC 2.2-5-14 states in relevant part:

(d) The purchase of tangible personal property which is to be incorporated by the purchaser as a material or an integral part is exempt from tax. “Incorporated as a material or an integral part into tangible personal property for sale by such purchaser” means:

- (1) That the material must be physically incorporated into and become a component of the finished product;
- (2) The material must constitute a material or an integral part of the finished product; and
- (3) The tangible personal property must be produced for sale by the purchaser.

Even assuming, *arguendo*, that the stickers are “physically incorporated” into the finished product, the taxpayer has not established that the stickers “constitute a material or integral part” as required by 45 IAC 2.2-5-14(d)(2). The taxpayer’s protest is denied.

Fixed Assets: Computer Program; PDA; Laptop

This portion of the taxpayer’s protest involves, per the taxpayer, “exempt and/or previously taxed items.” The taxpayer states:

The purchase from [Company L] is not for a software program but an “access software portal.” The seller sells access to their server in California as an online business application service. See attached invoice with agreement.

The Audit Report stated that it was a “computer program license fee.” At hearing the taxpayer stated that [Company L] allows the taxpayer to log-in, that it is an access portal. Taxpayer stated that any tax owing is to California, not Indiana (though the taxpayer did not show that it in fact paid tax to California). Once again, the Department notes that it did not find the agreement amongst the faxed material (and reiterates that a reference system of some sort for the brief and the documents would have been helpful). The taxpayer’s protest is denied.

The taxpayer also protests “PDA’s,” stating:

Please see copies of the [Company M] invoices showing that sales tax was collected.
Please remove the use tax assessment.

The Audit Report described the items as “PDA—computers used as networking devices.” The “invoice” provided by the taxpayer appears to be a taxpayer internal document; the taxpayer also sent a copy of check from [Company M] *payable to the taxpayer*, and it is dated for 2005. The Department is not sure what a 2005 payment by [Company M] to the taxpayer purports to establish. The taxpayer’s protest is denied.

Another protested item within this subheading is a laptop computer, with the taxpayer noting:

[An employee] purchased the laptop from a local retailer and paid sales tax at point of purchase. [Employee], approximately two years later, sold the laptop to [taxpayer] in a casual sale. A “casual sale” is an isolated or occasional sale of tangible personal property that was originally acquired by the seller for the seller’s own use or consumption and not for resale.

The taxpayer cites to 45 IAC 2.2-1-1(d), which states (*Emphasis added*):

The Indiana gross retail tax is not imposed on gross receipts from casual sales except for gross receipts from casual sales of motor vehicles and sales of rental property. A casual sale is an isolated or occasional sale *by the owner* of tangible personal property purchased or otherwise acquired for his use or consumption, where he is not regularly engaged in the business of making such sales.

The Department imposed use tax on this transaction. Regarding use tax, IC § 6-2.5-3-2(a) states (*Emphasis added*):

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a *retail transaction*, regardless of the location of that transaction or of the *retail merchant* making that transaction.

Sales tax is not imposed on a casual sale, and since the employee, in this situation, is not a retail merchant making a retail transaction, use tax is not imposed either. The taxpayer’s protest is sustained.

Forklift Loaners:

The Audit Report notes:

Capitalized forklift trucks are used as loaners free of charge when service repairs on customer lifts extend longer than normal. Older fully depreciated capitalized vehicles that may be available are used when appropriate. This adjustment covers the cost of the forks as well as tires and parts used to keep these vehicles operational.

The taxpayer states:

[Taxpayer] does not agree with the assumption of \$20,000 per truck for a new truck in the loaner fleet. Loaners are provided to customers from [taxpayer’s] used truck inventory and/or from the rental fleet. The fleet trucks are older and in many cases fully depreciated. [Taxpayer] estimates the loaner truck value at \$5,000. This amount represents an average wholesale market value factoring in an estimated amount [taxpayer] believes they could recover if the loaner trucks were sold. [Taxpayer] has prepared a calculation of loaner forklifts displaying this loaner truck value and use tax.

Again, to reiterate, the taxpayer bears the burden of proof. The taxpayer has not shown that its numbers are more accurate than those used in the Audit Report. Additionally, it appears, from the quotation from the Audit Report, that the Department already took account of the “older fully depreciated capitalized vehicles.” Taxpayer’s protest is denied.

The taxpayer argued that a month (in the year 2002) was included twice in the Audit. The Department requests that the Audit Division examine the Audit Report to verify this contention.

FINDING

The taxpayer’s protests are denied, with the following exception: the taxpayer is sustained regarding the “casual sale” purchase of a laptop computer. The Department also asks the Audit Division to examine the documentation supplied regarding the exemption certificates and the additional month issue for the year 2002.

II. Tax Administration – Interest and Penalty

The taxpayer states that it requests “all penalty and interest be waived as well since [taxpayer] applied for the results of the audit to be under the 2005 amnesty program.” It is true that taxpayer’s that properly participated and complied with the Tax Amnesty Program the Department “abated ... interest, penalties....” See IC § 6-8.1-3-17(c) However, a taxpayer that participated in the Tax Amnesty Program “relinquish[ed] all rights to protest a tax liability that is being paid” and also “agree[ed] not [to] file a claim for refund of the tax paid.” See 28 Indiana Register 3585.

It does not appear that the taxpayer at issue participated in Tax Amnesty, but if the taxpayer did it would preclude this protest by the taxpayer. Turning to the law that governs interest and penalty, the Department refers to IC § 6-8.1-10-1 and 45 IAC 15-11-2. The former states in relevant part (*Emphasis added*):

(a) If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on his return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

...

(e) The department *may not* waive the interest imposed under this section.

Thus the taxpayer is denied regarding the interest. With regard to the negligence penalty, 45 IAC 15-11-2(b), states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer’s carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and

follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) provides in pertinent part:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

Taxpayer has not affirmatively established the requisite reasonable cause, as required by 45 IAC 15-11-2(c).

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The taxpayer's protest is denied.

DP/BK/DK December 13, 2006